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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1118

ARCHIBALD E. ROBERTS, Petitioner,

v.

STANLEY R. RESOR, Secretary of the Army
(successor in office to Cyrus R. Vance)

DAVID E. McGIFFERT, Under Secretary of the Army
(successor in office to Stephen Ailes)

MAJOR GENERAL KENNETH G. WICKHAM, U.S. Army,
The Adjutant General, United States Army (successor in office to Major General Joe C. Lambert),
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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No.

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v.

STANLEY R. RESOR, Secretary of the Army
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Archibald E. Roberts, petitioner prays that a Writ of Certiorari issue to review the erroneous decision and Judgment of the United States Court of Appeals for the District of Columbia Circuit denying petitioner's "Motion for Compliance" with a judgment and Order previously affirmed by such Court, directing the restoration of your petitioner to the officer status in the United States Army which he occupied prior to his unlawful release from active duty and transfer to an inactive duty status:

together with all the rights, privileges and emoluments to which he would have been entitled both by law and regulations, but for the unlawful and invalid order hereinbefore declared null and void. (J.A. 4-6)[1]

OPINIONS BELOW

The Opinion affirming the denial of the Motion for Compliance dated December 13, 1968 is not yet reported, but is printed in the Appendix hereto, pages 1a-3a.

The original opinion holding the action of the Secretary of the Army illegal and void decided June 18, 1964 is *Roberts v. Vance*, reported at 119 U. S. App. D. C. 367, 343 F. 2d 236.

The Order on Remand and the Opinion pertaining thereto are set forth in the Joint Appendix at pages 4 and 2.

The Per Curiam Order of the Court below affirming the Order issued pursuant to remand is set forth at (J.A. 6). The Motion for Compliance, the Opposition thereto and the Order denying such motion are set forth at (J.A. 7, *et seq.*; 40 *et seq.*; and 111-112).

JURISDICTION

The final judgment of the U. S. Court of Appeals for the District of Columbia Circuit was dated and entered December 13, 1968.

The Jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court below err in concluding that petitioner's claim to promotion to Lieutenant Colonel was abandoned by his former Counsel when at the hearing on remand he stated "that he would be unable to furnish proof that plaintiff (petitioner herein) was entitled to be /so/ promoted".

---

[1] Hereinafter the Joint Appendix filed with the Court below shall be designated "J.A."

2. Did the Court below err in concluding that petitioner was not entitled to be re-imbursed for 102 days of leave, which had he not been unlawfully deprived of active status he would have accrued and been able to take as it accrued.

3. Did the Court below err in concluding that the Army Board for the Correction of Military records did not possess the requisite authority to grant re-imbursement to petitioner for the expenditure for civilian legal services necessary to protect his rights as an Officer of the United States Army.

4. Did the Board deny petitioner's right of Freedom of Speech in violation of the First Amendment by predicating such refusal on the ground that petitioner had addressed the Daughters of the American Revolution without first receiving the permission of the Army to do so, particularly where as here, no breach of the National Security or divulgence of Military Secrets is involved.

REASONS FOR GRANTING THE WRIT

The instant case in its entirety raises serious and important issues in the administration of the acts of Congress and the administrative procedures designed to protect the status of military officers who have served 18 or more years, but less than 20 years (10 U.S.C. 1006) and the extent of authority vested in the Army Board for the Correction of Military Records (10 U.S.C. 1552).

The failure of the Army Board for the Correction of Military Records to re-establish *en toto* the army status which petitioner occupied prior to his unlawful and void release from active duty by the Secretary of the Army reopens the question alleged in petitioner's original complaint as to whether such action constituted a deprivation of petitioner's rights under the First Amendment to the Constitution, *i.e.*, the expression of views which did not fall within any exception covering National Security and did not constitute an offense subject to Court Martial Proceedings which question was left open by the Court below.

STATEMENT OF THE CASE

Petitioner after serving in the Army during World War II in both the European and Pacific theatres as an enlisted man and officer, renewed his Army service in 1950 in the Korean War where he attained the grade and rank of Major by appointment of the President.

Petitioner continued his active duty and served in said rank in Germany and at the time of his illegal release was on active duty at Fort Lee, Virginia.

While so serving he was as the Court below found illegally relieved from active duty and transferred to an inactive status after serving 18 years and 9 months, 14 years of which had been in officer status.

Until the time of such release he had been accorded the highest efficiency ratings, his performance had been considered superior and outstanding and he was considered to be an officer of superior intellect, loyal and trust worthy. (J.A. 7-8).

In addition he had been recommended for promotion to Lieutenant Colonel and by admissions of the Army Examiner and the Judge Advocate General he would have been so promoted but for the illegal action of the Secretary of the Army (J.A. 16, 24).

Subsequently petitioner sought reconsideration of the Secretary's action and among other things requested as an "emolument" of his officer status the legal services of the office of the Judge Advocate General but his request was denied (J.A. 29-30), thus necessitating resort to the expense of civilian counsel and subsequent Court and administrative actions.

Having no other recourse petitioner brought suit in the United States Court for the District of Columbia and after extended litigation that Court issued it's Order on May 12, 1965 which on appeal was affirmed by the Court below on July 21, 1965.

It is this Order which forms the subject matter of the instant petition and it provided as follows in so far as material:

> ORDERED that the order of the Secretary of the Army dated April 27, 1962, relieving plaintiff from active duty status in the United States Army and transferring him to inactive duty status be, and the same is hereby declared null and void for the reason that the Court of Appeals has held that the said order was not issued in compliance with applicable Army regulations binding upon the said Secretary; and it is
>
> FURTHER ORDERED that any and all orders issued by the subordinates of the Secretary of the Army implementing the Secretary's order of April 27, 1962 be and the same are hereby declared null and void; and it is
>
> FURTHER ORDERED that plaintiff's Motion for Summary Judgment upon the remand be, and the same is hereby granted and the defendants' Motion for Summary Judgment on the remand be, and the same is hereby denied; and it is
>
> FURTHER ORDERED that defendants restore plaintiff to the status which he occupied in the United States Army prior to the unlawful action heretofore set aside, together with all the rights, privileges and emoluments to which he would have been entitled, both by law and regulations, but for the unlawful and invalid order hereinbefore declared null and void; . . . (J.A. 4-5).

Following the action of the Court below petitioner through civilian counsel instituted proceedings before the "Army Board for the Correction of Military Records", as provided for in title 10 U.S.C. Section 1552.

In such proceeding Petitioner sought the following relief (J.A. 10-11);

> a. That such record be corrected to reflect promotion to the rank of Lieutenant Colonel, A.U.S., as of June 26, 1962, which promotion plaintiff

(petitioner) would have received on June 26, 1962, but for the said illegal action of the Secretary dated April 27, 1962 releasing plaintiff (petitioner) from active duty; and that the plaintiff (petitioner) be paid compensation in the rank of Lieutenant Colonel from June 26, 1962, until his ultimate retirement on September 30, 1965; and that his retirement pay should reflect and be predicated upon such promotion.

b. That plaintiff (petitioner) be paid an amount that would reflect the value of the annual leave that plaintiff (petitioner) would have been entitled to but for the illegal action of the Secretary.

The amount of said leave based upon the 30 days annual leave to which Army personnel are entitled, which has been denied to plaintiff (petitioner) by the Secretary's illegal Order and the value of which plaintiff (petitioner) sought to recover in the proceeding before the Army Board for the Correction of Military Records was 102 days covering the period from May 8, 1962 (the date of plaintiff's (petitioner's) illegal separation) to September 30, 1965 (the date of Petitioner's retirement).

c. That plaintiff (petitioner) be reimbursed for the legal expense amounting to $20,590.94 incurred by reason of the Secretary's illegal action; that said summary and illegal dismissal by the secretary deprived plaintiff (petitioner) of an "emolument" attaching to his officer rank, to wit: The free legal assistance of Army counsel through the office of the Judge Advocate General, thus necessitating the expenditure set forth above.

Following a hearing the Army Board for the Correction of Military Records on April 13, 1966 issued the following order directing that;

1. That all of the Department of the Army records of ARCHIBALD E. ROBERTS be corrected to show:

a. that effective 30 September 1960, promoted to lieutenant colonel, United States Army Reserve;

b. that he was placed on the Army of the United States Retired List on 1 October 1965 in the grade of lieutenant colonel; and

c. that at the time of his retirement from service on 30 September 1965, he was entitled to credit for 24½ days of accrued leave.

2. That so much of the application of ARCHIBALD E. ROBERTS, as pertains to reimbursement of $20,590.94 for legal fees, and promotion to lieutenant colonel, Army of the United States, be and hereby is, denied. (J.A. 11-12)

Having failed to receive the full relief which he believed he was entitled to under the reparation Order petitioner through counsel filed in the United States District Court a "Motion for Compliance" claiming the following relief i.e. that his military records be corrected:

(1) To reflect the promotion of plaintiff (petitioner) to Lieutenant Colonel, A.U.S. effective June 26, 1962.

(2) To compensate plaintiff (petitioner) in accordance with the rank of Lieutenant Colonel, A.U.S., from June 26, 1962 to the date of his retirement, September 30, 1965, and to have his retirement pay reflect and be predicated upon such promotion.

(3) To compensate plaintiff (petitioner) for 102 days of annual leave with interest thereon.

(4) To reimburse plaintiff (petitioner) for the sum of $20,590.94 legal expense incurred solely by reason of the illegal order of the Secretary of the Army, together with interest and costs of the litigation necessary to vindicate his rights in the matter and such other and further relief as may be just and proper. (J.A. 12-13)

Following argument on the Motion, the Court on November 27, 1967 issued its order denying petitioner's claims for (a) attorneys fees (and other legal) expenses amounting to $20,590.94, incurred in connection with this litigation, and (b) monetary compensation for leave in excess of 60 days (petitioner claims compensation for 102 days) and on the ground of abandonment, insofar as plaintiff (petitioner) thereby seeks promotion to the rank of Lieutenant Colonel as a Reserve Officer on active duty. (J.A. 111-112).

Thereafter on January 16, 1968 Petitioner filed Notice of Appeal to the Court of Appeals from the aforesaid Order dismissing petitioner's Motion for Compliance, and on February 27, 1968 appellant filed his Statement of Points. (J.A. 112, 113-114)

Briefs were thereafter filed and following oral argument thereon the court below issued its PER CURIAM opinion Judgment affirming the District Court's denial of petitioner's Motion for Compliance. (See Appendix hereto, pp. 2a-3a).

ARGUMENT

I.

The Court below erred in concluding that petitioner's claim to promotion to Lieutenant Colonel was abandoned by his former Counsel when at the hearing on remand he stated "that he would be unable to furnish proof that plaintiff (petitioner herein) was entitled to be [so] promoted".

At the outset Counsel of the ability and competence of Oliver Gasch now Judge of the United States District Court for the District of Columbia could not have intended by the statement above set forth to abandon one of the basic claims of petitioner for no such inherent authority is possessed by an attorney and no express authority to so abandon is anywhere shown in the record. Furthermore no such authority was ever granted.

The original decision of the Court below had confined its determination to the absence of due process by the Secretary of the Army in releasing petitioner from active duty, the function of the Court on remand was clearly confined to a re-establishment of the status which petitioner enjoyed in the Army prior to the void and illegal dismissal from such active duty. The order agreed upon pursuant to remand is therefore a reparation order designed to accomplish such purpose and makes no exception to the claim to promotion nor does it contain any determination that such claim was abandoned.

We submit further that the Court's interpretation of Counsel's statement was inconsistent with the original opinion of the Court below when in remanding the case to the District Court it referred to foot note 11 thereof and which among other things stated as follows:

> For an Order permanently enjoining defendants . . .from refusing or failing permanently to restore plaintiff to the status which he enjoyed prior to the unlawful action complained of, including promotion to the rank of Lieutenant Colonel, for which he had been officially selected, as reported in Army Circular 624-3, dated 26 January 1962.

That the Court on remand was fully aware of such reference is shown by the Memorandum of Judge Jones (J.A. 3) that the "relief to the plaintiff (petitioner)" was that set forth in footnote 11 of the original decision of the Court of Appeals.

Despite this awareness the District Court deviated from the mandate of the Court of Appeals by re-opening the question of petitioner's entitlement to promotion which had been set at rest by acceptance of the documentary evidence that petitioner had been officially selected for promotion to Lieutenant Colonel by the Army, and the restoration of his status required such promotion.

"A lower court has no power or authority to deviate from the mandate issued by an appellate court but is bound

thereby and cannot re-open questions which the mandate lays to rest". *United States v. Cato Bros., Inc.*, (C.A. 4) 273 F. 2d 153, *cert denied* 362 U. S. 927; *Briggs v. Pennsylvania R. Co.*, 334 U. S. 304.

The language of former Counsel "that he would be unable to furnish proof that plaintiff (petitioner) was entitled to be promoted to the rank of Lieutenant Colonel" may be interpreted in yet another fashion.

Assuming arguendo that original Counsel had sought to introduce evidence with respect to the specifics of the status to which petitioner was entitled to be restored including promotion to Lieutenant Colonel, he would have been met by the argument that he had not exhausted the Administrative Process, that such evidence was a proper subject to be considered by the Army Board for the Correction of Military records the administrative tribunal commissioned by Congress to hear such cases and not in the first instance by the Court. *Myers v. Bethlehem Shipbuilding*, 303 U. S. 41.

Finally in the proceeding before the Army Board claim was made for such promotion and no claim of abandonment was interposed by the Government. Indeed the evidence adduced before that tribunal demonstrates that petitioner would, had he not been illegally released from active duty, have been so promoted (J.A. 16 par. 7).

In sum, the original complaint claims such promotion, the original decision of the Court of Appeals in remanding the case to the District Court points specifically to the promotion as being required to re-establish the army status which petitioner was illegally deprived of and further the claim was fully litigated before the Army Board for the Correction of Military Records without the interposition of the issue of abandonment by the Government.

It is submitted that the Court below erred as a matter of law in concluding that petitioner's claim to promotion was abandoned by his former Counsel.

II.

The Court erred in concluding that petitioner was not entitled to be re-imbursed for 102 days of leave which, had he not been unlawfully deprived of active status he would have accrued and been able to take as it accrued.

We submit that, the Court of Appeals having in its original opinion determined that the action of the Secretary of the Army was illegal and void, petitioner was in contemplation of law on active duty from April 27, 1962 until his ultimate retirement on September 30, 1965.

The Court's reliance on 10 U.S.C. Sec. 701(b) which states that "not withstanding any other provision of law a member may not accumulate more than 60 days leave" is we submit misplaced.

The contention made by petitioner is that, but for the unlawful and void action of the Secretary, petitioner would have been entitled to remain on active duty and take such leave as it accrued. He should therefore be recompensed for such loss, for as the Court of Claims held in *Egan v. U. S.*, 158 Supp. 377, 387:

> The payment authorized by 10 U.S.C.A. 1552 is not for services actually performed on active duty, but rather for services which would have been performed had the error or injustice. . .not occurred.

Petitioner should therefore be reimbursed for such loss occasioned, as it was, by the unlawful and void action of the Secretary.

III.

The Court below erred in concluding that the Army Board for the Correction of Military records did not possess the requisite authority to grant re-imbursement to petitioner for the expenditure for civilian legal services necessary to protect his rights as an Officer of the United States Army.

The Court below has here decided an important question of law which has not been, but should be, settled by this Court.

We submit that Congress vested broad authority in such Board and intended by so doing to provide an administrative substitute for the enactment of private bills for the correction of military records.

Thus the Congress has vested such tribunal with broad jurisdiction "to correct any error or remove an injustice."

These terms do not have a limited or technical meaning (41 Ops. Atty. Gen. March 20, 1952), and the corrective action entrusted to the Board is designed to erase fully error and provide compensation for injustice (*Caddington v. U.S.*, 178 F. Supp. 604).

The breadth of the Statute is shown by the recent case of *Oleson v. U.S.*, 172 Ct. Cl. 9.

In enforcing this statute (10 U.S.C. Section 1552), the court in *Oleson, supra*, held that:

> The legislation is remedial and to be liberally construed, rather than narrowly or technically. 40 Ops. Atty. Gen. 504, 508 (1947); 41 Ops. Atty. Gen. 203, 206, 208 (1954). Nothing in the legislative history forbids this result. On the contrary, that history tends to aid the conclusion that the Board can correct military records insofar as they comprise or mirror erroneous or mistaken legal views, although there is no change in the hard facts themselves. "[I]t is clear that the Correction Boards were initially authorized in 1946 to provide an administrative sub-

> stitute for the enactment of private bills for the correction of military or naval records." *Friedman v. United States, supra*, 159 Ct. Cl. at 38, 310 F.2d at 404; *Ogden v. Zuckert*, 298 F. 2d 312, 314-15 (C.A.D.C., 1961); 40 Ops. Atty. Gen. 504 (1947); 41 Ops. Atty. Gen. 71, 73 (1951); 41 Ops. Atty. Gen. 203, 206-07 (1954). It would seem to follow the Boards were given jurisdiction to change the legal conclusions imbedded in military records just as Congress could do, and had done, by private act.
>
> We conclude that the Correction Board and the Secretary acted within their statutory authority in changing and correcting Captain Oleson's records. When he was paid as a consequence of the Board's determination, that payment was wholly lawful and proper under the specific statutory provision (added in 1951) authorizing the services to make payments due as a result of a correction in records (section 1552 (c)). Under the statute, too that determination and the payment, lawfully made, were "final and conclusive on all officers of the United States," including the General Accounting Office (section 1552 (a)).

Under the facts of the instant case the Secretary selected the method of removing petitioner from active duty and in failing to observe his own regulations acted unlawfully and as the Court found his action was null and void.

Petitioner requested a Court Martial and legal representation by the Office of the Judge Advocate.

His request was denied because no charges cognizable by a Court Martial were filed against him.

Thus the Secretary by selecting the administrative method of release caused petitioner to secure civilian legal counsel and incur the expense of such counsel to protect his rights as an Officer of the Army.

It is petitioner's contention that the Board acting as a substitute for Congress and being authorized to pay claims for "allowances, emoluments, or other pecuniary benefits,

or for repayment of a fine or forfeiture" out of "current appropriations", possessed ample authority to re-imburse petitioner for cost of legal representation.

IV.

By predicating it's refusal on the ground that petitioner by addressing the Convention of the Daughters of the American Revolution without permission the Army Board has denied petitioner the right of Freedom of Speech in violation of the First Amendment of the Constitution.

There is a clear conflict between the conclusion of the Court below and that of the Army Board for the Correction of Military Records.

The former concludes (erroneously as we have shown) that petitioner's claim to promotion to Lieutenant Colonel was abandoned.

The latter (the Army Board) concludes that said denial was justified because petitioner spoke, without Army permission, to the Convention of the Daughters of the American Revolution.

The Board concluded as follows:

> 1. That although the applicant was considered and selected for temporary promotion to lieutenant colonel by a Selection Board which adjourned on 1 December 1961, thereafter, on 19 April 1962, a Report of Suspension of Favorable Personnel Actions was filed in his military records and remained in effect at the time of his relief from active duty on 7 May 1962.
>
> 2. That under the foregoing circumstances, the referral of the applicant's records to a board of of officers for recommendation following his restoration to status in August 1965 is considered to have been a proper action to determine his qualification for such promotion.

> 3. That in the light of the *applicant's conduct which led to his relief from active duty*, it is reasonable to presume that such conduct would have precluded his promotion to lieutenant colonel, Army of the United States, had his relief from active duty not beem effected. (Italics supplied)
>
> 4. That in consideration of the foregoing, there is no error or injustice in his failure to have been recommended for, or promoted to, the grade of lieutenant colonel, Army of the United States, retroactive to 26 June 1962, upon his restoration to active duty on August 1965.

The action of the Board which discloses the real reason for the denial of promotion thus raises the real question of this extended litigation.

May the Army restrict the Constitutional right of Freedom of Speech of the officers where there is no breach of National Security or divulgence of Military Secrets.

This basic issue is therefore presented squarely and merits full consideration by the Court.

This Court has most jealously protected the right to express one's views and opinions and particularly where public officials have sought to place previous restraints on this fundamental right. *Grosjean v. American Press*, 297 U.S. 233; *Thornhill v. Alabama*, 310 U.S. 88.

The latitude of allowable expression is demonstrated most forcibly in this Court's recent cases of *New York Times Co. v. Sullivan*, 376 U.S. 254 wherein it stated that:

> debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.

It is submitted that the denial of petitioner's promotion is violative of his rights under the First Amendment.

CONCLUSION

In conclusion, it is submitted that the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 21,679 Civil 2106-62

ARCHIBALD E. ROBERTS,
Appellant,

v.

STANLEY R. RESOR, Secretary of the Army (Successor in office to Cyrus R. Vance), et al.,
Appellees.

[FILED Dec., 13, 1968]

Appeal from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge; Danaher and Burger, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof it is ordered and adjudged by this Court that the judgment . . . . . of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court:

Nathan J. Paulson,
Clerk

Dated: December 13, 1968.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

[Caption Omitted in Printing]

Decided December 13, 1968

Before BAZELON, *Chief Judge*, and DANAHER and BURGER, *Circuit Judges*.

PER CURIAM: By order of the Secretary of the Army this appellant had been relieved of duty and transferred to inactive status under circumstances more fully treated in *Roberts v. Vance*.[1] Pursuant to our opinion, the District Court on remand set aside the order of the Secretary, whereupon the appellant in the District Court filed his "Motion for Compliance." He had thus sought additional compensation in certain particulars including a claim for 102 days of annual leave with interest thereon and reimbursement in the sum of $20,590.94 said to represent legal expenses incurred by him in vindicating his position in the litigation referred to.

Since the appellant was unable to furnish proof on remand that he had been entitled to be promoted to the rank of Lieutenant Colonel, the District Court on the ground of abandonment properly denied this aspect of his claim.

10 U.S.C. § 701 (b) provides that "notwithstanding any other provision of law a member may not accumulate more than 60 days leave." Since the statute admits of no exception, it seems clear enough that the District Court correctly denied the appellant's claim to annual leave for 102 days.

[1] 119 U. S. App. D.C. 367, 343 F. 2d 236 (1964).

The appellant contends finally that if a court martial had been convened he would have been entitled to the protection of legal counsel to be provided by the Office of the Judge Advocate General. He points to 10 U.S.C. §1552 (1964) as a predicate for his claim that since there was no court martial he is entitled to be reimbursed for the legal expenses and costs incurred in his engagement of civilian attorneys. We find ourselves unable so to interpret the statute.[2] Rather, as the Government asserts on brief such reimbursement if available at all will require action by Congress. We preceive no basis upon which recovery of the expenses of the appellant's litigation can be ordered by this court.

Affirmed.

---

[2] Appellant at oral argument was bound to concede that he knew of no other provision of law by statute or otherwise which might predicate recovery.

APPENDIX B

STATUTE

10 U.S.C. Section 1552. *Correction of Military Records: Claims Incident thereto*

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid–

(1) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(2) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or

(3) as otherwise prescribed by the law applicable to that kind of payment.

A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Administrator of Veterans' Affairs.

(f) The Secretary of Defense for the military departments, and the Secretary of the Treasury for the Coast Guard, shall report to Congress every six months on claims paid under this section during the period covered by the report. The report shall include for each claim the name of the claimant, a brief description of the claim, and a statement of the amount paid. Aug. 10, 1956, c. 1041, 70A Stat. 116.

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339-014—68

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1118

ARCHIBALD E. ROBERTS, PETITIONER

v.

STANLEY R. RESOR, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the district court (J.A. 111–112 [1]) and the *per curiam* opinion of the court of appeals (Pet. App. 2a–3a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1968 (Pet. App. 1a). The petition for a writ of certiorari was filed on March 6, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "J.A." refers to the joint appendix filed in the court of appeals.

QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that a) petitioner's claim to promotion to Lieutenant Colonel had been abandoned, b) petitioner was not entitled to reimbursement for 102 days of accumulated leave, and c) petitioner was not entitled to reimbursement for civilian legal services.

2. Whether petitioner's First Amendment rights were in any respect violated.

STATUTES INVOLVED

10 U.S.C. 701(b) provides, in pertinent part:

> Notwithstanding any other provision of law, a member [of the Armed Forces] may not accumulate more than 60 days' leave. * * *

10 U.S.C. 1552, also involved, is set forth at Pet. App. 4a–5a.

STATEMENT

1. On April 19, 1962, petitioner, then a reserve officer—with the rank of Major—on active duty with the Army, delivered a speech before the national convention of the Daughters of the American Revolution without clearance, as required by Army regulations, and after an earlier submitted speech had been denied clearance. In the speech he ascribed a Communist background to the Mayor of Los Angeles and criticized an Assistant Secretary of State (see *Roberts* v. *Vance*, 343 F. 2d 236, 237 (C.A.D.C.)).

By order of the Secretary of the Army dated April 27, 1962, petitioner was relieved from assignment and from active duty and, effective May 7, 1962, was transferred to inactive status (J.A. 55–56). That order was

challenged and the court of appeals, in *Roberts* v. *Vance, supra,* held the order invalid because of the omission of certain steps in the prescribed Army procedure applicable in such situations. A remand to the district court was made for consideration of petitioner's motion for summary judgment "in the light of this opinion, and to conduct such further proceedings as may be necessary to determine the extent of the relief required" (343 F. 2d at 240).

An earlier Army action had been taken with respect to petitioner's conduct, which action was neither considered nor held invalid by the court of appeals. At a time prior to the D.A.R. speech, petitioner had been routinely selected, along with others, for temporary promotion to the rank of Lieutenant Colonel. The names on the promotion list were arranged in order of seniority, and promotions were made in that sequence. However, on April 19, 1962, following the speech at the D.A.R. convention but prior to the order transferring petitioner to inactive status on May 7, 1962, a so-called "flagging action" was initiated, pursuant to pertinent Army regulations, which suspended any favorable personnel actions pending the investigation of the statements petitioner had made (J.A. 67, 92). This action was expressly stated to be based upon related "unfavorable characteristics or integrity" (J.A. 67), and it was separate both in basis and in point of time from the subsequent transfer action (J.A. 55–56).[2]

[2] The court of appeals' opinion referred to the loss of promotion only indirectly (343 F. 2d at 237, 240, nn. 2, 11), in noting a variety of claims for relief that petitioner had advanced, in-

2. At the hearing on remand, petitioner's counsel stated that he would be unable to furnish proof that petitioner was entitled to promotion to Lieutenant Colonel, despite the reference thereto in petitioner's complaint. Counsel for both parties stated that they could reach an agreement on the relief to be ordered, and were directed to present an order setting forth the agreed relief (J.A. 2–3). On May 12, 1965, the district court entered its order (J.A. 4–5) declaring void the Secretary of the Army's order of April 27, 1962, and any orders implementing that order, and also providing (see Pet. 5):

> FURTHER ORDERED that defendants restore plaintiff to the status which he occupied in the United States Army prior to the unlawful action heretofore set aside [the order of April 27, 1962], together with all the rights, privileges and emoluments to which he would have been entitled, both by law and regulations, but for the unlawful and invalid order hereinbefore declared null and void.

No reference whatever was made to the separate earlier order of April 19, 1962.

3. The Army thereafter proceeded with steps to comply with the terms of the district court order, in-

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cluding others which were not pursued, *e.g.*, alleged loss of quartermaster and PX privileges, medical care access for petitioner and his family, and housing and travel privileges. Petitioner's statement (Pet. 4) that he would have been promoted but for the "illegal action" of the Secretary of the Army is, moreover, incorrect. This refers to the action of transferring petitioner from active status, effective May 7, 1962. Prior to that date, however, on April 19, 1962, the "flagging action" as to promotion had already been taken, and this action was not held illegal (see *supra*, p. 3).

cluding, *inter alia*, the reassignment of petitioner to active duty on August 6, 1965 (J.A. 57–58), the payment to petitioner of a total of $24,471.32 in back pay and allowances, and credit for 60 days of accumulated unused leave (J.A. 59). As to petitioner's promotion, which had been flagged prior to the invalid transfer order (*supra*, p. 3), the Army immediately initiated procedures to determine whether petitioner was qualified for promotion to Lieutenant Colonel (J.A. 63–64). A board of officers to which petitioner's records were referred found him not to be so qualified, and accordingly recommended the removal of his name from the 1961 promotion list (J.A. 61, par. 1).[3]

On September 2, 1965, petitioner applied for voluntary retirement, was placed on the retired list as of October 1, 1965, and became eligible for retirement pay at that time (J.A. 69–73).

4. On November 15, 1965, petitioner filed an application for correction of his military records, seeking administratively to obtain substantially the relief later sought in his "Motion for Compliance" filed in the district court (see *infra*, p. 7), *i.e.*, (1) temporary promotion to Lieutenant Colonel on active duty as of June 26, 1962 (the date he would have been reached for promotion absent suspension of personnel action), (2) payment of the monetary equivalent of the annual leave he asserted that he did not take during

[3] Subsequently, petitioner's records were again referred to a board of officers, for consideration under the same criteria and instructions established for the 1962, 1963, 1964, and 1965 selection boards, and this board similarly found petitioner not qualified for promotion (J.A. 61–62, par. 2).

the period when he was relieved from active duty, beyond the 60 days with which he had been credited, and (3) payment of $20,590.94 to reimburse him for the legal fees and other expenses allegedly incurred in connection with the litigation concerning the validity of the April 27, 1962, order.

The Army Board for Correction of Military Records held a hearing on petitioner's application, and on April 13, 1966, rejected all of the claims presently in issue. With respect to the claim to promotion to Lieutenant Colonel, the Board noted that a "flagging action" had been taken in regard to petitioner on April 19, 1962, and that the referral of his records to a board in 1965, after his restoration to active status, was "a proper action to determine his qualification for such promotion" (J.A. 109). In this regard, the Board concluded that "in the light of the applicant's conduct which led to his relief from active duty, it is reasonable to presume that such conduct would have precluded his promotion to lieutenant colonel, * * * had his relief from active duty not been effected," and accordingly found "no error or injustice in his failure to have been recommended for, or promoted to, the grade of lieutenant colonel * * * retroactive to 26 June 1962, upon his restoration to active duty in August 1965" (*ibid.*). In addition, the Board found that petitioner was not entitled to reimbursement for the 102 days of leave which he claimed (J.A. 109–110), and it further denied his application for reimbursement of legal fees and related expenses (J.A.

110).[4] The Board's recommendations were approved by the Under Secretary of the Army on October 17, 1966 (J.A. 91).

5. In January 1967 petitioner filed the instant "Motion for Compliance" in the district court, alleging that the Secretary of the Army had not complied with the district court's order of May 12, 1965, by failing (1) to correct the records to show petitioner as a Lieutenant Colonel on active duty from and after June 26, 1962, (2) to compensate him in accordance with the alleged rank, (3) to pay him the value of the 102 days of annual leave he had allegedly lost, and (4) to pay him the sum of $20,590.94 for his legal fees and expenses in obtaining the setting aside of the order transferring him to inactive status. He sought an order directing respondents to make the aforesaid correction of records and the requested payments (J.A. 7–13).

Respondents, in opposing the motion, pointed out that promotion in the Armed Forces, or the denial thereof, is a matter wholly committed to executive discretion and is not reviewable judicially, and that the claim as to promotion had in any event been waived by petitioner's counsel at the hearing prior to the district court's order of May 12, 1965 (see *supra*, p. 4, and J.A. 40–41, 50, 53–54). As to the claim for reimbursement of legal fees and expenses, respondents challenged the jurisdiction of the district

[4] The Board did recommend correction of the records to show petitioner's promotion to the rank of Lieutenant Colonel *in the Army Reserve*, and also a minor correction of the leave figures (J.A. 110).

court to order such reimbursement, since the United States was not a party to the litigation and in any event the amount claimed was in excess of $10,000 and therefore triable in the Court of Claims, if anywhere, under 28 U.S.C. 1346(a)(2). Moreover, it was noted that court costs may not be imposed against the United States and its officers, absent waiver of sovereign immunity. On the merits, respondents asserted that litigation costs are not an "emolument" of an Army officer, within the meaning of 10 U.S.C. 1552(c) (J.A. 49–53). Finally, with respect to compensation for the alleged loss of leave sought by petitioner, respondents similarly challenged the jurisdiction of the district court, and, as to the merits, called the court's attention to the unconditional bar of 10 U.S.C. 701(b) to the accumulation of more than 60 days of leave (J.A. 54).

6. The district court, in an order entered on November 27, 1967 (J.A. 111–112) held, in pertinent part that

> [petitioner's] "motion for compliance" be, and hereby is, denied: on the merits, insofar as plaintiff thereby seeks to recover (a) the attorney's fee (and other legal) expenses, amounting to $20,590.94, incurred in connection with this litigation, and (b) monetary compensation for leave in excess of the 60 days maximum cumulation permitted by 10 U.S.C. 701(b); and on the ground of abandonment, insofar as plaintiff thereby seeks promotion to the rank of Lieutenant Colonel as a Reserve Officer on active duty.

7. Upon appeal of this order by petitioner, the court of appeals affirmed *per curiam*, agreeing with the district court in all material respects, and noting that 10 U.S.C. 1552 did not provide for reimbursement for civilian legal services (Pet. App. 2a–3a).

ARGUMENT

Under the district court's order of May 12, 1965, entered pursuant to the remand by the court of appeals, respondents were directed to restore petitioner to such former rights, privileges, and emoluments of his active duty status as would have existed but for his invalid transfer from active duty on May 7, 1962. Two courts—the district court and the court of appeals—have determined that the provisions of the remand by the court of appeals have been fully met by the responsive actions of the Army, including payment of full back pay. Petitioner's claims of entitlement to further relief were correctly denied below, and in any event do not embody questions of general application so as to warrant additional review by this Court.

1. In the first place, nothing in the broad purposes underlying the establishment of military boards for the correction of records—"to remove an injustice"—purported to give these boards the virtually unlimited legislative powers possessed by the Congress in passing a private bill for relief. Neither the boards nor respondents were permitted to go beyond the limits of their statutory authority to make payments or take other requested actions. Nor were they in any

respect entitled to disregard outright the statutory bars to certain steps as, for example, the absolute prohibition on the accumulation of leave in excess of 60 days contained in 10 U.S.C. 701(b). In short, whatever relief petitioner was to obtain had necessarily to be provided within the framework of existing law.

2. Petitioner had no right to promotion to Lieutenant Colonel on active duty at the time of his invalid transfer to inactive status as of May 7, 1962. His normal course toward promotion had already been suspended prior thereto on April 19, 1962, immediately after his improper conduct at the D.A.R. convention. He thus no longer had any right to promotion that could be lost by the order of transfer, and accordingly no right to be restored upon the voiding of the transfer. His promotion was lost by reason of his conduct and not by reason of the transfer. The findings of later boards that petitioner was not qualified for such promotion involved, moreover, matters of executive discretion. See *Powell* v. *Brannan*, 196 F. 2d 871, 873 (C.A.D.C.); *Daub* v. *United States*, 227 F. Supp. 941, 944 (E.D.N.Y.). Petitioner's counsel thus acted properly in abandoning the claim to promotion, and the district court was correct in rejecting petitioner's later attempt to reassert that claim.[8]

[8] Petitioner's attempt to interject a First Amendment argument before this Court with respect to his non-promotion (Pet. 14–15) is both belated and lacking in merit. Petitioner makes no showing that, in the final determination as to his competence for promotion, his speech at the D.A.R. convention was the sole or even a critical element of the conduct taken into account. The denial of promotion—at all events a highly discretionary executive decision—would necessarily rest upon a

3. Petitioner was not entitled to accumulate leave in excess of 60 days during the period when he was relieved, albeit improperly, from active duty. The statutory bar contained in 10 U.S.C. 701(b) is absolute and could neither be waived nor ignored by the Army Correction Board. Such a body has never been given the unlimited authority to make payments that are the province of the Congress in passing a private bill (see supra, p. 9).

4. Finally, petitioner was not entitled to be recompensed for sums paid by him for attorney's fees and other expenses incurred incident to the instant civil litigation. His transfer to inactive status did not deprive him of anything he was entitled to as an Army officer in this regard, whether termed an "emolument" of his office or otherwise. While he subsequently argued that he requested a court-martial and that at such a proceeding the Army would have furnished an attorney for him, the denial of a court-martial was not seriously challenged. Nor was that denial set aside in the court of appeals or in the district court. Ac-

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composite of petitioner's entire record, including the consideration of his considerable past difficulties (see 343 F. 2d at 237, n. 1). While his earlier record, standing alone, had not yet blocked promotion, the combination of that record with the speech could disclose to the promotion boards the resumption of an intolerable pattern of disobedience and disregard of established service policy (see *supra*, p. 5). Such personality traits are obviously relevant to an officer's qualifications for promotion in rank and the enhanced responsibilities which would flow therefrom. Accordingly, the expansive constitutional right to unlimited speech by military officers, which petitioner here seeks to assert, is afforded no premise in the narrow factual situation of the instant case.

cordingly, no right to government-provided counsel was established; a *fortiori*, it cannot be shown to have been lost.[*] The court below thus correctly held that 10 U.S.C. 1552, on which petitioner relied, provided no basis for this claim (Pet. App. 3a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[*] Moreover, if the district court had treated its May 12, 1965, order as calling for a reimbursement to petitioner of the legal expenses he claims, on the ground that he suffered damages to this extent by reason of having to challenge the invalid transfer order, the court would have run afoul of jurisdictional limitations in 1) entertaining a species of tort claim without waiver of sovereign immunity to suit, and 2) entertaining a claim in excess of $10,000 in violation of 28 U.S.C. 1346(a)(2), since petitioner asserted that his legal expenses were in excess of $30,000 (see *supra*, pp. 7–8).

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